Zakaria bin Jusoh (as personal representative of Jusoh bin Mamat, deceased) v Minah bt Omar and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS D-02(NCVC)(W)-1005–06 OF 2014 AND D-02(NCVC)(W)-1006–06 OF 2014
ZAHARAH IBRAHIM, VARGHESE GEORGE AND PRASAD ABRAHAM JJCA
4 AUGUST 2016

Land Law — Ownership — Claim for — Plaintiff claim for shares of land which plaintiff purported bought from owners — Whether plaintiff purchased shares of land from owners — Whether plaintiff proved on balance of probabilities she bought share in land

These appeals were filed by the plaintiff and the third defendant in the court below against the decision of the trial judge in dismissing the plaintiff's claim for share in land known as Lot 1381 in Kota Bharu ('subject land') against one Embong bt Osman, deceased ('Embong's share') and in allowing the plaintiff's claim for share in the subject land against one Jusoh bin Mamat, deceased ('Jusoh's share'). The first defendant in the court below was the personal representative of Embong bt Osman whereas the third defendant was the personal representative of Jusoh bin Mamat. With regards to the claim for Embong's share, the plaintiff submitted that her daughter ('SP2') went along with her to visit Embong and saw the plaintiff paid the sum of RM5,000 to Embong. There was also the evidence that three of Embong's children and a child of Jusoh went to meet the plaintiff to ask additional amount of RM10,000. In reply, the first defendant submitted that Embong's other children and Jusoh's child went to meet the plaintiff to ask her to go to land office to apply for order of distribution of Embong's estate but the plaintiff refused to do so. In respect of claim for Jusoh's share, the third defendant submitted the fact that the plaintiff had taken control of Jusoh's portion of the subject land and that house had been built on that portion was not conclusive evidence of a sale of land. Further, it was submitted that the document of title was not with the plaintiff as to prove the sale of the subject land. The plaintiff in reply emphasised the fact that there was no cross-examination of the evidence by the plaintiff that she tried several times to take Jusoh to the land office to have the transfer effected, but to no avail.

Held, dismissing the appeal by the third defendant and allowing the appeal by the plaintiff:

(1) Based on the evidence of all the witnesses especially the unchallenged evidence of SP2, the plaintiff had proved on the balance of probabilities that she did buy Embong's share in the subject land, the consideration being the amounts she had been lending to Embong over a period of time and the final payment of RM5,000 (see para 49).

(2) From the evidence of third defendant and Jusoh's widow, the plaintiff had taken control of Jusoh's portion of the subject land. Further, it was not in dispute that Jusoh took a sum of RM1,000 from the plaintiff and that sum was never repaid. In addition, despite Jusoh's death, no move was made by the third defendant to have Jusoh's share in the subject land registered in his name. Thus, grounded on the evidence and findings of fact of the learned trial judge, the plaintiff had indeed purchased Jusoh's share in the subject land (see paras 44–45, 47 & 51).

[Bahasa Malaysia summary

Rayuan-rayuan ini difailkan oleh plaintif dan defendan ketiga di mahkamah bawahan terhadap keputusan hakim perbicaraan dalam menolak tuntutan plaintif bagi bahagian di dalam tanah yang dikenali sebagai Lot 1381 di Kota Bharu ('tanah subjek') terhadap seorang yang bernama Embong bt Osman, si mati ('bahagian Embong') dan dalam membenarkan tuntutan plaintif bagi bahagian dalam tanah subjek terhadap seorang yang bernama Jusoh bin Mamat, si mati ('bahagian Jusoh'). Defendan pertama di mahkamah bawahan adalah wakil peribadi Embong bt Osman sementara defendan ketiga adalah wakil peribadi Jusoh bin Mamat. Berkenaan tuntutan bagi bahagian Embong, plaintif berhujah bahawa anak perempuannya ('SP2') pergi bersama dengannya untuk melawat Embong dan melihat plaintif membayar sejumlah RM5,000 kepada Embong. Juga terdapat keterangan bahawa tiga anak Embong dan anak Jusoh pergi berjumpa dengan plaintif untuk meminta jumlah tambahan sebanyak RM10,000. Dalam jawapan, defendan pertama, defendan pertama berhujah bahawa anak Embong yang lain dan anak Jusoh pergi berjumpa dengan plaintif untuk meminta dia pergi ke pejabat tanah bagi memohon perintah estet Embong tetapi plaintif enggan berbuat sedemikian. Berkaitan tuntutan untuk bahagian Jusoh, defendan ketiga berhujah fakta bahawa plaintif telah mengambil alih bahagian Jusoh terhadap tanah subjek dan bahawa rumah tersebut telah dibinaatas bahagian tanah tersebut bukan keterangan konklusif jualan tanah. Selanjutnya, ia dihujahkan bahawa dokumen hak milik bukan berada dengan plaintif untuk membuktikan jualan tanah subjek tersebut. Plaintif dalam jawapan menekankan fakta tidak terdapat pemeriksaan balas keterangan oleh plaintif yang dia mencuba beberapa kali untuk membawa Jusoh ke pejabat tanah untuk menguatkuasakan pemindahan tersebut, tetapi tidak berjaya.

Diputuskan, menolak rayuan oleh defendan ketiga dan membenarkan rayuan oleh plaintif:

(1) Berdasarkan ke atas keterangan kesemua saksi-saksi terutamanya keterangan yang tidak dicabar SP2, plaintif telah membuktikan atas imbangan kebarangkalian bahawa dia memang membeli bahagian Embong dalam tanah subjek tersebut, balasan adalah jumlah yang dipinjamkannya kepada Embong melampaui satu tempoh masa dan bayaran akhir sebanyak RM5,000 (lihat perenggan 49).

(2) Daripada keterangan defendan ketiga dan janda Jusoh, plaintif telah mengambil alih bahagian Jusoh terhadap tanah subjek. Selanjutnya, ia tidak dipertikaikan bahawa Jusoh mengambil jumlah RM1,000 daripada plaintif dan jumlah tersebut tidak pernah dibayar balik. Tambahan lagi, meskipun kematian Jusoh, tiada pemindahan yang dibuat oleh defendan ketiga untuk membuat bahagian Jusoh di dalam tanah subjek didaftarkan di dalam namanya. Oleh itu, berdasarkan ke atas keterangan dan dapatan fakta hakim perbicaraan yang bijaksana, plaintif sememangnya telah membeli bahagian Jusoh di dalam tanah subjek tersebut (lihat perenggan 44–45, 47 & 51).]

Notes

For cases on claim for ownership, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4235–4246.

Legislation referred to

Small Estates (Distribution) Regulations 1955 Form E

Appeal from: Civil Suit No 22-NCVC-28–02 of 2013 (High Court, Kota Bharu)

Mohd Nizam bin Haji Wahab (Nizam Zaidi & Assoc) in Appeal No D-02(NCVC)(W)-1005–06 of 2014 for the appellant.
Roziman bin Mohd Nor (Ahmad Nizam bin Mohamed with him) (Nizam & Roziman) in Appeal No D-02(NCVC)(W)-1006–06 of 2014 for the appellant.
Mohd Nizam bin Haji Wahab (Nizam Zaidi & Assoc) in Appeal No D-02(NCVC)(W)-1006–06 of 2014 for the respondents.
Roziman bin Mohd Nor (Ahmad Nizam bin Mohamed with him) (Nizam & Roziman) in Appeal No D-02(NCVC)(W)-1005–06 of 2014 for the respondent.

Zaharah Ibrahim JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal from the decision of the High Court of Malaya at Kota Bharu in respect of two claims by Minah bt Omar ('the plaintiff') against the defendants.

[2] As against Mat Harun bin Awang Teh ('the first defendant') in his personal capacity and in his capacity as the personal representative of Embong bt Osman, deceased, the plaintiff's claim was for 2/6 of that parcel of land being Lot 1381, GM 41, Mukim Guntong, in Limbat, in the District of Kota Bharu, Kelantan ('subject land'). As against Zakaria bin Jusoh ('the third defendant'), in his capacity as the personal representative of Jusoh bin Mamat, deceased, the plaintiff's claim was for 1/6 of the subject land.

[3] The learned trial judge dismissed the plaintiff's claim against the first defendant but allowed her claim against the third defendant.

[4] Appeal No D-02(NCVC)(W)-1005–06 of 2014 was the third defendant's appeal against the High Court decision allowing the plaintiff's claim against him. Appeal No D-02(NCVC)(W)-1006–06 of 2014 was the plaintiff's appeal against the High Court decision dismissing her claim against the first defendant ('Mat Harun').

BRIEF BACKGROUND

[5] The subject land was previously registered in the joint names of the plaintiff (1/6 share), Jusoh bin Mamat (1/6 share) ('Jusoh's share'), Embong bt Osman (2/6 share) ('Embong's share') and Fatimah bt Seman (2/6 share).

[6] Embong was the plaintiff's mother and Jusoh and the first defendant were the plaintiff's half-brothers, Embong being their mother.

[7] Embong's share in the subject land was transmitted to the first defendant after her death. Embong passed away on 26 March 2004. However the transmission of her share to the first defendant was only effected in 2011 pursuant to the presentation of the order for distribution in Form E of the Small Estates (Distribution) Regulations 1955 (presentation No 2330/2011).

[8] Embong's share was subsequently sold to a third party who was not a party to the suit. However, the purchaser was not yet registered as the proprietor of Embong's share.

[9] The plaintiff's claim was for Embong's share and Jusoh's share in the subject land.

IN THE HIGH COURT

The plaintiff's claim for Embong's share

[10] The plaintiff claimed that Embong's share had been sold to her as she had been giving loans in small amounts over a period of time to Embong. In return she was allowed to take control of the portion of the subject land allocated to Embong ('Embong's portion') and had planted crops and fruit trees on Embong's portion of the subject land. When Embong became ill, Embong decided to sell Embong's share to the plaintiff for the sum of RM5,000, together with the amounts of the earlier loans. However, Embong passed away before the legal transfer could be effected.

[11] The first defendant however disputed the plaintiff's claim. According to him Embong did not sell Embong's share to the plaintiff. He admitted nevertheless that the plaintiff had a share in Embong's share of the subject land under the Islamic estate distribution law ('faraid'). He claimed he still held the plaintiff's share from the proceeds of the sale to the third party.

The plaintiff's claim for Jusoh's share

[12] In respect of Jusoh's share in the subject land, the plaintiff claimed that that share was sold to her by Jusoh for RM1,000.

[13] Pursuant to the sale, one of the plaintiff's children built a house on Jusoh's portion of the subject land, with no objection from Jusoh during his lifetime, or his children after his death

[14] The third defendant however claimed that Jusoh only 'charged' Jusoh's share in the subject land to the plaintiff for RM1,000 in order to buy a motorcycle.

[15] The third defendant also claimed that Jusoh could not have sold the land for RM1,000 as the value of the land was much more than that at the material time.

[16] The third defendant admitted that the amount which he claimed to have only been borrowed by his late father was never repaid. However, he claimed that it was not repaid as the plaintiff had taken control of Jusoh's portion of the subject land and enjoyed the portion and the proceeds from the crops planted on that portion. As for the house built on that portion, the third defendant claimed that he and his family members could not stop the construction of the house as they did not realise that a house was built until after it was already built.

The first defendant's counterclaim

[17] The first defendant also filed a counterclaim seeking the revocation of

the order for distribution and the registration of his name based on that order as the proprietor of Embong's share in the subject land, and seeking the registration of the names of all of Embong's heirs as co-proprietors of Embong's share in accordance with the rules of 'faraid'.

Evidence before the High Court

[18] Before the High Court, no documentary evidence was adduced in relation to the claims by the plaintiff and denials of those claims by the defendants. The only documents adduced in evidence were copies of the issue document of title of the subject land and the documents relating to the first defendant's application for the removal of the caveat entered by the plaintiff, as well as the court order for the extension of the caveat pending the disposal of the plaintiff's suit.

[19] The High Court therefore had to determine the plaintiff's claim based purely on the oral evidence of the plaintiff and her witnesses and that of the defendants and their witnesses.

The High Court decision

[20] After hearing the oral evidence of the witnesses, the High Court made the decisions set out below.

The plaintiff's claim for Embong's share

[21] The learned trial judge dismissed the plaintiff's claim for Embong's share of the subject land. His principal ground for doing so was that Embong's share had been sold to a third party. His Lordship however held that the plaintiff was entitled to a share in the proceeds of that sale as a beneficiary of Embong's estate.

The plaintiff's claim for Jusoh's share

[22] The learned trial judge decided, on the balance of probabilities, that Jusoh's share of the subject land had been sold to the plaintiff as the payment of RM1,000 was admitted by the third defendant. It was also admitted that one of the plaintiff's children had built a house on Jusoh's portion of the subject land and the plaintiff had in fact taken control of that portion and planted padi and other crops on that portion. His Lordship also took into account the third defendant's admission that the borrowed sum was never repaid.

APPEAL

[23] The plaintiff as well as the third defendant appealed to this court against the High Court decisions.

SUBMISSIONS

The claim for Embong's share

[24] Learned counsel for the plaintiff submitted that SP2, the plaintiff's daughter, went along with the plaintiff to visit Embong and saw the plaintiff pay the sum of RM5,000 to Embong. There was also the evidence of SP5 that three of Embong's children and a child of Jusoh's went to meet the plaintiff to ask for an additional amount of RM10,000.

[25] Learned counsel for the first defendant however submitted that Embong's other children and Jusoh's child went to meet the plaintiff to ask her to go to the land office so that they could apply for the order of distribution for Embong's estate (including Embong's share of the subject land). However, the plaintiff refused to do so. Although there was a caveat entered by the plaintiff, it was submitted that the sale had been concluded and the purchase price had already been paid.

The claim for Jusoh's share

[26] Before us, it was submitted for the third defendant that the fact that the plaintiff had taken control of Jusoh's portion of the subject land and that a house had been built on that portion by one of the plaintiff's children was not conclusive evidence of a sale of that portion. By the time the case went to trial, no one was staying in the house built on that site.

[27] Learned counsel for the third defendant also submitted that if indeed Jusoh's share was sold to the plaintiff, why was the document of title not with the plaintiff? It was also claimed that it was Jusoh who planted the plants on Jusoh's portion of the subject land.

[28] Learned counsel for the plaintiff in reply highlighted the fact that there was no cross-examination of the evidence by the plaintiff that she tried several times to take Jusoh to the land office to have the transfer effected, but to no avail.

ANALYSIS

The claim for Embong's share

[29] The plaintiff and her children gave evidence in support of her claim that she purchased Embong's share. Except for SP2, the rest of the plaintiff's children only knew about the purchase of Embong's portion of the subject land from what the plaintiff told them.

[30] We noted with interest that while during the cross-examination of the plaintiff it was put to her that Embong objected to the plaintiff occupying and taking control of Embong's portion of the subject land (which was denied by the plaintiff), none of the witnesses for the defendants raised the issue of any objection having been made by Embong to the plaintiff's control of Embong's portion of the subject land. In fact the issue of Embong's objection was never raised with the other witnesses.

SP2's evidence

[31] SP2 gave evidence that she was present when the plaintiff paid Embong the sum of RM5,000 and heard Embong say 'aku juallah tanah tu' and heard the plaintiff say 'ambo beli lah tanah tu dengan duit ni, dan juga dengan hok bayar sikit-sikit sebelum ini'. SP2 also heard Embong say that if she could walk she would go to the land office to effect the transfer.

[32] SP2 also testified (as could be seen from her witness statement) that she used to see Embong come to the plaintiff's house to borrow money from the plaintiff and she also heard Embong telling the plaintiff that the money borrowed from the plaintiff would be paid by the transfer of Embong's share in the subject land to the plaintiff (with an additional RM5,000 which was given later).

[33] We noted that when SP2 was cross-examined her evidence on the sum of RM5,000 being paid to Embong and the oral sale and purchase transaction between Embong and the plaintiff was not challenged.

[34] SP2's evidence (and the plaintiff's) had some support from SD2.

SD2's evidence

[35] The first defendant's sister, SD2, with whom Embong stayed at the time of her death and who had a house near Embong's, testified that Embong did go to the plaintiff's house at various times for visits. She also testified (confirming the plaintiff's evidence) that when Embong was ill, the plaintiff did visit Embong at her house, and when Embong was quite ill, the plaintiff in fact stayed with Embong. However SD2 denied that the plaintiff paid Embong the sum of RM5,000 or that Embong gave her ('SD2') the money to keep.

[36] SD2 confirmed that the plaintiff took control of ('retah/rentah') Embong's portion of the subject land.

[37] Both SD2 and the first defendant claimed that the plaintiff occupied Embong's portion of the subject land as Embong lived with her then husband in Beris, quite a distance from the subject land, while the plaintiff lived near the subject land.

[38] Unfortunately, the learned trial judge did not consider SP2's evidence and paid emphasis essentially only on the fact that Embong's share had subsequently been sold.

Sale of Embong's share of the subject land

[39] Embong's share was sold by the first defendant upon his name being registered as the proprietor of Embong's share on the authority of the order for distribution.

[40] The learned trial judge overlooked the crucial fact that the first defendant had indirectly *admitted* that the order for distribution was *wrongly obtained* when the first defendant (in his personal capacity) filed a counterclaim to have the order for distribution revoked. This can be seen from the defendants' defence which also contained the first defendant's counterclaim in para 29.

[41] The first defendant and the other defence witnesses admitted that the plaintiff's name was omitted when they applied for the order for distribution. They claimed that she refused to join and cooperate despite their going to her house to persuade her to go. The plaintiff on the other hand claimed she did not know of the application for the order for distribution and did not know of the sale until someone came to survey the subject land. She also claimed that when the first defendant and the other siblings came to her house, they did so to demand an additional payment of RM10,000 for Embong's share of the subject land (which claim they denied).

[42] While being concerned with the rights of the third party who purchased Embong's share of the subject land, the learned trial judge failed to consider that if the order for distribution was wrongly issued, the first defendant would have no capacity to sell that share.

[43] The learned trial judge also did not consider the fact that a caveat was entered as soon as the plaintiff knew of the sale by the first defendant of

Embong's share in the subject land and as a result the transfer to the third party could not be effected. That third party never became a registered joint proprietor of the subject land.

The claim for Jusoh's share

[44] The learned trial judge allowed the plaintiff's claim for Jusoh's share of the subject land as His Lordship found, from the evidence of the third defendant as well as Jusoh's widow ('SD3'), that the plaintiff had taken control of Jusoh's portion of the subject land. His Lordship took into account SD3's evidence that she and Jusoh and their children, including the third defendant, had all gone to the house built by one of the plaintiff's children on that portion.

[45] The learned trial judge also found that it was not in dispute that Jusoh took a sum of RM1,000 from the plaintiff and that sum was never repaid.

[46] All the defence witnesses claimed that the plaintiff took control of Jusoh's portion of the subject land as security for the loan. The third defendant claimed that it was not repaid as the plaintiff and family had profited from the occupation of that portion.

[47] However, we noted that despite Jusoh's death (some eight years before the date of the trial), no move was made by the third defendant to have Jusoh's share in the subject land registered in his name. His siblings did not do so either.

[48] It was claimed by Jusoh's family members who gave evidence that they did not raise objections to the house built by one of the plaintiff's children on Jusoh's portion of the subject land as it was just a wooden house and their relationship then with the plaintiff's family was good. But evidence was given by SP6 that the house had become empty as the plaintiff's child who built the house was doing business in Peringat. In fact, the first defendant gave evidence that the house was no longer there. Yet no move was made to reclaim Jusoh's portion of the subject land or Jusoh's share in the subject land.

FINDING

The claim for Embong's share

[49] In our considered view, upon examining the evidence of all the witnesses, especially the unchallenged evidence of SP2, the Plaintiff had proved on the balance of probabilities that she did buy Embong's share in the subject land, the consideration being the amounts she had been lending to Embong over a period of time and the final payment of RM5,000.

[50] We were aware of the fact that the third party purchaser was not named as a party to this suit. However, in our considered view, this suit related purely to the plaintiff's claim vis a vis the first defendant and her other siblings and the principal issue was purely whether Embong's share of the subject land had ceased to be hers before her demise and therefore was not part of her estate such as to enable the first defendant to have it registered in his name pursuant to the order for distribution.

The claim for Jusoh's share

[51] Having examined the evidence and the findings of fact of the learned trial judge in relation to the plaintiff's claim for Jusoh's share of the subject land as discussed above, we were of the considered view that we had no reason to disagree with His Lordship's finding that the plaintiff had indeed purchased Jusoh's share in the subject land.

DECISION

[52] Based on the above considerations, we dismissed the appeal by the third defendant and allowed the appeal by the plaintiff.

[53] That part of the order of the High Court in respect of the plaintiff's claim for Embong's share of the subject land was set aside. Prayers (a), (d) and (e) of para 34 of the statement of claim were allowed as prayed.

[54] We made no order as to costs in view of the relationship between the parties and ordered the deposits to the refunded.

Third defendant's appeal dismissed and plaintiff's appeal allowed.

Reported by Dzulqarnain Ab Fatar